

R. R. asks the Utah Labor Commission to review Administrative Law Judge Eblen's denial of Mr. R.'s claim for permanent total disability compensation under the Utah Workers' Compensation Act. J&S Mechanical and one of its workers' compensation insurance carrier, Reliance Insurance, ask the Commission to review Judge Eblen's award of permanent partial disability compensation to Mr. R..

The Commission exercises jurisdiction over these motions for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUES PRESENTED

Mr. R. seeks workers' compensation benefits for injuries from two separate accidents at J&S Mechanical. The first accident occurred on March 27, 1998, and involved a blow to the back of Mr. R.'s head. At that time, Reliance Insurance was J&S's insurance carrier. The second accident occurred on January 8, 1999, when Mr. R. was engaged in heavy lifting and experienced low back pain. At the time of the second incident, American Protection Insurance was J&S's insurance carrier.

On March 21, 2001, Judge Eblen conducted an evidentiary hearing on Mr. R.'s claims. On October 16, 2001, Judge Eblen issued an interim Order concluding, among other things, that the accident of March 27, 1998, had left Mr. R. with a 7% whole person impairment due to a cervical spine injury. Because Judge Eblen found no conflict in the medical evidence on this point, she declined to appoint a medical panel to consider the issue. On May 30, 2002, the Commission issued its Order affirming Judge Eblen's determination.

Later, Judge Eblen referred several other medical issues involved in Mr. R.'s claim to a medical panel. On May 6, 2003, after receiving the panel's report, Judge Eblen issued her final Order. In summary, Judge Eblen required Reliance to pay permanent partial disability compensation for a 7% whole person impairment for cervical spine injury caused by the March 1998 accident. The Order also required American Protection Insurance to pay medical expenses and permanent partial disability compensation for a 20% whole person impairment for lumbar spine injury caused by the January 1999 accident. Judge Eblen's Order denied Mr. R.'s claim for permanent total disability compensation.

Mr. R. has now filed a motion for review with the Commission arguing that he has met §413(1)'s criteria for permanent total disability compensation. Reliance has also filed a motion for review with the Commission, arguing that Mr. R. is not entitled to any permanent partial disability compensation for the March 1998 accident.

FINDINGS OF FACT

Before proceeding to state the facts that are material to Mr. R.'s claim, the Commission notes some confusion regarding the Commission's role in the fact-finding process. In particular,

American Protection Insurance argues the Commission cannot re-weigh the evidence or substitute its judgment for that of the ALJ, but must defer to the ALJ's findings if supported by "substantial evidence." However, American Protection's argument is contrary to Utah statute and appellate precedent.

Section 34A-1-303(4) of the Utah Labor Commission Act allows the Commission, among other actions, to "modify" or "reverse" and ALJ's decision. The Commission's fact finding authority is also supported by a long line of Utah appellate court decisions. In United States Steel v. Industrial Com'n, 607 P.2d 807 (Utah 1980), the Utah Supreme Court commented as follows:

Our statutes do not mandate or indicate that the Commission is bound by the findings of the Administrative Law Judge when the evidence is conflicting. On the contrary, Section 35-1-82.54 provides that when a case is referred to the full Commission, it shall review the entire record, and may make its own findings of fact and enter its award thereon. In doing so it may, in its discretion, take further evidence. Though this Court cannot overturn the findings of fact made by the Commission if there is substantial evidence furnishing a reasonable basis for such findings, there is nothing in our statutes which limits the power of the Commission itself in reviewing and adopting or reversing the findings of its Administrative Law Judge. . . . (Citations omitted.)

In more recent cases, Utah's appellate courts have continued to hold that ALJs' findings are not binding on the Commission. Giles v. Industrial Commission, 967 P.2d 743, 745 (Utah 1984); USX Corp. v. Industrial Commission, 781 P.2d 883, 886 (Utah App. 1989); Virgin v. Board of Review, 803 P.2d 1284, 1287 (Utah App. 1990); Chase v. Industrial Commission, 872 P.2d 475, 479 (Utah App. 1994); Commercial Carriers v. Industrial Commission, 888 P.2d 707, 710 (Utah App. 1994). These Utah appellate decisions are consistent with the majority rule in other states. See Larson's Workers' Compensation Law, §80.12(b), p. 15-565.

Thus, while the Commission respects the ALJs' findings of fact, and in most cases concurs with those findings, the Commission is nevertheless empowered to reach contrary findings according to the Commission's own appraisal of the evidence. The Commission will now proceed to consider the facts relevant to the parties' motions for review in this case.

March 1998 accident. Mr. R.'s first accident took place at the J&S worksite on March 27, 1998. While a forklift was moving a dumpster to a new location, the dumpster struck Mr. R. on the back of his hard hat. On April 2, 1998, he sought medical attention for headache, neck pain and upper back pain. Over the next several months he reported varying degrees of pain and, at some point, began to complain of low-back pain. He was diagnosed with cervical and thoracic strain and treated with medication, physical therapy and trigger point injections. He continued to work at J&S, but with light-duty restrictions.

In its previous Order dated May 30, 2002, the Commission found that Mr. R. suffered a 7% whole person impairment as a result of his cervical injury from the March 1998 accident. The Commission reaffirms its previous Order for the reasons stated therein.

January 1999 accident. Mr. R. experienced his second accident at J&S on January 8, 1999, when he experienced pain in his low back, radiating down his left buttock and leg, as he carried a heavy roll of plastic at the job site.

As a result of his work-related accident and injury, Mr. R. underwent a period of conservative medical care and diagnosis. He then underwent a L5 hemilaminectomy and discectomy on May 21, 1999, followed by additional surgery on October 13, 1999, to fuse his spine at the L4-5 and L5-S1 levels. After a period of recovery from his surgeries, Mr. R. reached medical stability on May 30, 2000. At that time, he was left with a 20% whole person impairment from his work-related lumbar spine injuries.

Mr. R.'s ability to work. Mr. R. is a 47 years old high school graduate. He has difficulty reading. He is licensed to drive. He has substantial training and work experience in plumbing, and work experience in heavy equipment operation and construction labor, but no other significant work experience or training.. Mr. R. is physically able to perform work in the light-medium category, with occasional lifting up to 35 pounds and repetitive lifting of up to 20 pounds. He can sit or stand for 15 minutes at a time and can walk for up to 25 minutes. He cannot perform work that requires frequent bending or twisting. He also suffers from mild depression. Since Mr. R.'s most recent accident, he has not actively sought employment.

DISCUSSION AND CONCLUSION OF LAW

As previously noted, both Mr. R. and Reliance have requested review of Judge Eblen's decision. In its prior Order of May 30, 2002, the Commission addressed the issue raised by Reliance. The Commission hereby reaffirms its prior Order for the reasons stated therein, and will not further address Reliance's motion for review.

With respect to Mr. R.'s motion for review, Mr. R. argues that Judge Eblen erred in concluding that Mr. R.'s claim for permanent total disability compensation failed for lack of proof that he "cannot perform other work reasonably available, taking into consideration (his) age, education, past work experience, medical capacity, and residual functional capacity," as required by §34A-2-413(1)(c)(iv) of the Act.

The plain language of §413 makes it clear that it is the applicant's burden to establish the existence of each of the several statutory elements set forth therein, including the "other work" requirement of §34A-2-413(1)(c)(iv). In other words, an applicant's claim for permanent total disability compensation will fail unless the record affirmatively establishes that this "other work" test is met, by reference to the several factors identified in §34A-2-413(1)(c)(iv).

Judge Eblen's decision has somewhat modified §34A-2-413(1)(c)(iv)'s "other work" requirement by interpreting it to require a demonstration by Mr. R. that he had attempted to find other work within his capabilities. Specifically, at page 16 of her decision, Judge Eblen commented: "Where, as here, the petitioner has not attempted to find or perform other work reasonably available, he fails to prove there is no other work reasonably available."

The Commission does not agree with Judge Eblen's application of the "other work" requirement of §34A-2-413(1)(c)(iv). §34A-2-413(1)(c)(iv) does not, by its plain language, require an applicant to demonstrate that he or she has attempted to find or perform other work. It is therefore improper to apply such a standard as an "acid test." To the contrary, §34A-2-413(1)(c)(iv) enumerates the specific factors that must be considered, namely, age, education, past work experience, medical capacity, and residual functional capacity. Each of these factors must be considered in light of its impact on the applicant's ability to perform other work.

The Commission can envision some circumstances in which the factors of an individual's age, education, past work experience, medical capacity and residual functional capacity make it clear that the individual cannot perform any work. In such cases, the individual will have satisfied §34A-2-413(1)(c)(iv), whether or not the individual has engaged in an effort to find other work. The Commission can also envision the opposite situation, in which an individual has attempted, but failed, to find other work, but nevertheless, possesses strengths with respect to age, education, past work experience, medical capacity, and residual functional capacity to support a conclusion that the individual is properly held capable of performing other work. In other words, whether an individual has actually looked for work may be helpful in evaluating the factors established by §34A-2-413(1)(c)(iv), but an individual's effort or lack of effort to find work cannot, by itself, be considered determinative.

In light of the foregoing, the Commission concludes Judge Eblen has misapplied §34A-2-413(1)(c)(iv) by focusing entirely on Mr. R.'s failure to seek work, rather than weighing the statutory elements of age, education, past work experience, medical capacity, and residual functional capacity that are specifically mentioned in §34A-2-413(1)(c)(iv).

The Commission remands Mr. R.'s claim to Judge Eblen. On remand, Judge Eblen will reconsider whether Mr. R. can perform other work reasonably available to him in light of his age, education, past work experience, medical capacity, and residual functional capacity. On remand, Judge Eblen may conduct additional proceedings and issue such additional decisions as she considers necessary to comply with this decision.

ORDER

The Commission grants Mr. R.'s motion for review and remands this matter to Judge Eblen for further action consistent with this decision. It is so ordered.

Dated this 31st day of December, 2003.

R. Lee Ellertson, Labor Commissioner